Appeal No. UKEAT/0247/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 January 2015
Judgment handed down on 27 February 2015

Before

HIS HONOUR JUDGE PETER CLARK

MRS R CHAPMAN

MR D J JENKINS OBE

MR C F McGRATH — APPELLANT

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR COLIN McGRATH (The Appellant in Person)
For the Respondent	MR CHARLES BOURNE (One of Her Majesty's Counsel) and MS RACHEL KAMM (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

PART TIME WORKERS

Part-Time Worker discrimination claim. The Claimant, an Employment Tribunal lay member, sought to compare himself to a full-time salaried Employment Judge. That comparator was rejected by an Employment Judge sitting alone and the claim dismissed.

On appeal by the Claimant, a full division (a) rejected a complaint that the Employment Judge had decided the point based on his own experience rather than the evidence before him, and (b) that in any event the decision was plainly and unarguably correct given the differences as well as the similarities between the two roles.

HIS HONOUR JUDGE PETER CLARK

1. Mr McGrath, the Claimant, sat as an employer side lay member of the Employment Tribunals in the Manchester Region between 1981 and 2013. On 2 May 2013 he presented a claim form ET1 to the Employment Tribunal complaining that as a part-time judicial officer he was excluded from the judicial pension scheme by the Respondent, The Ministry of Justice ("MOJ"). The claim was brought under the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("PTWR"). He identified as his actual comparator for the purposes of the **PTWR** comparison a full-time salaried Employment Judge.

2. The claim, proceeding in the London (Central) Employment Tribunal, was resisted by the MOJ, which took the point, among others, that the work of the Claimant was not the same or broadly similar to that done by his comparator within the meaning of regulation 2(4) **PTWR**.

3. That issue was heard at a Preliminary hearing before Employment Judge Macmillan, sitting alone on 13 March 2014. The claim was dismissed, the Employment Judge holding that the two roles, lay member and salaried Employment Judge, were not comparable. Having delivered judgment orally at the hearing the Written Judgment with Reasons was promulgated on 23 April.

4. Against that Judgment the Claimant brings this appeal. On the paper sift Langstaff P rejected five of the six grounds of appeal advanced by the Claimant. The sixth ground was permitted to proceed to a Full Hearing at which the President directed, in the exercise of his discretion, the appeal would be heard by a full division of the Employment Appeal Tribunal comprising a Judge and lay members.

5. The Claimant exercised his right to an oral permission hearing under EAT Rule 3(10) in respect of the five grounds of appeal rejected on paper. That hearing took place on 25 September 2014 before me. For the reasons given in a Judgment delivered on that day, since transcribed, I dismissed the Rule 3(10) application. I refer to that Judgment by way of background.

6. Thus the remaining sixth ground of appeal now comes before this division for final determination. The Claimant represents himself, as he has throughout the proceedings. Mr Charles Bourne QC and with him Ms Rachel Kamm appear on behalf of the MOJ as they did below.

Ground 6

7. In the Notice of Appeal Mr McGrath heads ground six "Personal View". His complaint is that the Employment Judge became personally involved in the hearing; failed to remain impartial and pre-judged the case based on his own experience and perception of the respective roles of Employment Judge and lay members when hearing and determining claims brought in the Employment Tribunal. In relying on his own perception he disregarded the evidence adduced before him (by the Respondent) from a retired full-time salaried Employment Judge, Mr Clive Toomer. In these circumstances Mr McGrath did not receive a fair hearing. Accordingly the Judgment ought to be set aside and the case reheard before a different Tribunal.

8. In response, Mr Bourne submits, first that the Employment Judge did not improperly rely on his personal experience and that the Claimant suffered no unfairness. Secondly, and in any event, that the Employment Judge's conclusion on the comparability question was plainly and

unarguably correct, a proposition which Mr McGrath does not accept. We shall consider both strands of the argument.

Personal View

9. The previous learning in this jurisdiction all relates to the use by lay members of their experience in the world of work. Thus we have been referred to the judgment of Phillips P in **Dugdale v Kraft Foods Ltd** [1976] 1 WLR 1288 (also reported at [1977] ICR 48). In giving guidance on the use by industrial members of their life experience (1294G to 1295B) the EAT cautioned against an Employment Tribunal relying on the lay members' experience to determine a case without giving the witness whose evidence they reject an opportunity to deal with the point(s) in issue. Provided that is done there is no reason why the members should not draw on their own knowledge and experience. An example of how the failure to give a party that opportunity led to an Employment Tribunal decision being set aside is to be found in **Hammington v Berker Sportcraft Ltd** [1980] ICR 248.

10. In the present case the use of personal knowledge and experience relates to the Employment Judge. However, we do not believe that the principle is any different. By way of analogy, a civil Judge hearing a case of alleged professional negligence brought against a lawyer will inevitably draw on his or her own experience of the legal process in deciding whether or not the Defendant fell below the standard of the reasonably competent practitioner.

11. Here, it is plain that Employment Judge Macmillan, now retired from the post of salaried Regional Employment Judge, has considerable experience of the workings of the Employment Tribunal system from the inside. As he declared (Reasons, paragraph 18):

> **"… I have practiced before these tribunals since 1970, and have been a judge since the early 1980s …"**

12. Further, as Mr McGrath points out, Judge Macmillan, in the course of his judgment, robustly rejected the Claimant's characterisation of the respective roles of Employment Judge and lay member in a number of instances. By way of example, at paragraph 10:

> **"Not only, in my judgment, is Mr McGrath plainly and unarguably wrong about the law, the description which he gave me of the role of the lay member and of the nature of an employment tribunal were descriptions which I simply did not recognise from my experience over many years. …"**

At paragraph 12:

> **"… Apparently in the retiring room, in the world in which Mr McGrath inhabits, there are no leaders, it is a free for all and it was meant to be that way. Well, not in tribunals in which I have been the judge nor I suspect in which any of my colleagues have been the judge. …"**

And at paragraph 17:

> **"… Mr McGrath once again it seems to me [in the context of the Employment Judge presiding over the hearing at the Employment Tribunal], in an attempt to belittle quite unjustifiably the role of the salaried judge …"**

13. Do those remarks indicate a closed mind on the part of the Employment Judge, based on his own experience, adverse to the case being advanced by the Claimant such as to lead us to find procedural unfairness below?

14. It seems to us that the answer to that question depends on the answer to a number of supplementary questions.

15. First, was Mr McGrath given a proper opportunity to deal with those observations during the course of the hearing? See **Dugdale**; **Hammington**. The answer to that, based on Mr McGrath's conspicuously fair presentation before us, is yes. It seems that the Employment Judge fully engaged with Mr McGrath during the hearing in challenging his perception of the respective roles of the Employment Judge and lay members. In these circumstances we are satisfied that, having tested Mr McGrath's submissions, it was open to the Employment Judge

to reach conclusions based on his own long experience of the operation of those respective roles in practice. However, the matter does not end there.

16. Secondly, what of Mr McGrath's contention that in arriving at his conclusion Judge Macmillan disregarded the oral evidence before him of Mr Toomer? In our judgment, although no specific mention is made of Mr Toomer's evidence in the Reasons, having read Mr Toomer's witness statement, consisting of his answers to a series of questions, we are unable to discern any material difference between the relevant findings made by Judge Macmillan and the evidence given by Mr Toomer (there has been no application for the Judge's notes of Mr Toomer's oral evidence).

17. Mr McGrath's point on Mr Toomer's evidence is that, having stated at paragraph 21 of his witness statement that:

> **"The work done by claimant and comparator in hearing and deciding cases in accordance with the facts and the law is self-evidently of crucial importance as that is the raison d'être of the Employment Tribunal."**

Mr McGrath adds that, in cross-examination by him, Mr Toomer agreed that in the making of judgments the full-time Judge was equal to the members and that the work was similar or broadly similar.

18. To that limited extent, assuming that the answer in cross-examination is accurately reproduced by Mr McGrath, such 'concession' is plainly correct. That is the alpha and omega of Mr McGrath's case. The business of Employment Tribunals is to decide the cases which come before them and in that decision-making process all three members of the panel play an equal part; indeed the two lay members may and sometimes do outvote the Employment Judge

in their final decision. Ergo, they are engaged in the same or broadly similar work and the requirements of regulation 2(4) are met.

19. In our judgment that is an over-simplistic view. At paragraph 16 the Judge acknowledges four areas in which all members of an Employment Tribunal participate to the same or roughly the same extent: identifying the claims and issues in a case, reading and assimilating the papers, participating in the determination of claims by finding facts from the evidence presented (i.e. the 'concession' by Mr Toomer here relied on by Mr McGrath), and assessing and making awards (in successful claims).

20. Having identified the similarities in the roles the Judge also highlighted the differences, drawn from the evidence before him which included the job description of the salaried Employment Judge (paragraph 15). Those differences are set out at paragraphs 17 to 20. That answers a third question: did the Employment Judge arrive at conclusions based on the evidence before him rather than simply on the basis of his own long experience? Self-evidently he did.

21. What appears to be driving the claim advanced by Mr McGrath and which permeates this sixth ground of appeal, is a sense of status. That the Employment Judge set himself up as holding a somehow superior position in the Employment Tribunal process to that of his lay colleagues. If so, that would be wrong in our collective view. However that is not how we read this Judgment. Judge Macmillan was at pains to acknowledge the valuable input of the lay members. At paragraph 19 he said:

> **"I do not want anything in this judgment to be taken as implying that I think lay members of the employment tribunals play anything other than an extremely important role in its jurisdiction … I have been grateful to members on several occasions throughout my judicial career for steering me away from the cliff edge when I have taken a narrow lawyer's view of an issue and they have both said that's not how it happens in industry, that is wrong. That is**

> **the role of a lay member. We are in my judgment if I may be permitted a quasi political point, diminished without them."**

And that is really the point in this case. As we shall explore more fully when considering Mr Bourne's alternative submission, that the Judge's conclusion was plainly and unarguably right, the relevant question under regulation 2(4) was clearly identified by Lord Hope in the leading case of **Matthews v Kent and Medway Towns Fire Authority** [2006] ICR 365, a case on which Mr McGrath heavily relies. At paragraph 15 his Lordship said this:

> **"It is important to appreciate that it is the work on which the workers are actually engaged at the time that is the subject matter of the [regulation 2(4)] comparison. So the question whether they have a similar level of qualification, skills and experience is relevant only in so far as it bears on that exercise. An examination of these characteristics may help to show that they are each contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable. But the fact that they may fit them to do other work that they are not yet engaged in, in the event of promotion for example, would not be relevant."**

22. It is plain that in approaching this case Employment Judge Macmillan had those words in mind. At paragraph 5 he refers to his statement of the law in **Moultrie and others v MOJ** (ET Case Number 2201158/2012). We have been shown his Reserved Judgment in that case dated 14 November 2013. At paragraph 11 he sets out passages from the speech of Lord Hope in **Matthews**, paragraphs 14 and 15, and also that of Lady Hale, paragraphs 43 to 44. Applying that guidance he focused in the present case on both the similarities and the differences in the work in which a salaried Employment Judge and lay members of Employment Tribunals are actually (not hypothetically) engaged. In carrying out that exercise, we are quite satisfied, he drew not only on his own experience, which he put to the Claimant during the hearing, but also on the whole of the evidence before him in making findings of fact from which he was able to draw conclusions in reaching his determination.

23. For these reasons, we reject the 'private view' ground of appeal, ground six, which is the only live ground before us. Whilst expressing views based on his own considerable experience

we are not persuaded that this Employment Judge crossed the line so as to give the objective perception that he approached the case with a closed mind based on his own view of the respective comparative roles on which he was required to make an impartial decision.

Plainly and unarguably right?

24. Mr Bourne's alternative submission, which strictly only arises if we had upheld ground six, which we do not, goes to the question of disposal.

25. The Court of Appeal decision in **Dobie v Burns International Security Services** [1984] ICR 812, 818 produced the plainly and unarguably right test; per Sir John Donaldson MR. Once there has been a misdirection in law by the Employment Tribunal, the Employment Appeal Tribunal may dismiss the appeal where the result was nevertheless plainly and unarguably right.

26. That well-settled principle was recently revisited by the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920. At paragraph 21 Laws LJ found some difficulty with that test as formulated by the Master of the Rolls in **Dobie v Burns**. He restated the principle in this way; if the Employment Appeal Tribunal detects a legal error by the Employment Tribunal it must remit the case for rehearing unless, for present purposes, it concludes that the error was immaterial and the result as lawful as if it had not been made. Critically, it is not for the Employment Appeal Tribunal to retry the facts. Further, the criticism of our observation in **Buckland v Bournemouth University**, that we would have remitted an issue to the Employment Tribunal, by Jacob LJ in the Court of Appeal; [2010] ICR 908, paragraph 58, the 'Ping Pong' remark, does not appear to have found favour with the Court in **Jafri**. See Underhill LJ, paragraph 46.

27. Without going on to examine the further observations of Maurice Kay LJ on the approach in **Jafri**, to be found in **Burrell v Micheldever Tyre Services** [2014] IRLR 630, we shall follow the guidance of Laws LJ in **Jafri**, paragraph 21. For completeness, no agreement has been reached between the parties as to disposal in this case had we upheld ground six of the appeal.

28. One further point which occurs to us in the particular circumstances of this case is whether the **Jafri** test is inappropriate where the error of law involves procedural irregularity, apparent bias or other unfairness in the proceedings below. We do not believe so. Even had we upheld Mr McGrath's complaint under ground six, if we can properly conclude that the same result would be inevitable before another Employment Tribunal then it must be open to us to dismiss the appeal.

29. As to that, we entirely accept Mr Bourne's submissions. Applying Lord Hope's dictum in **Matthews**, paragraph 15, whilst we accept the similarities between the roles of Employment Judge and lay member identified by Mr McGrath and, we repeat, accepted by Judge Macmillan, the differences in the roles, summarised at paragraphs 17 to 20 of his Reasons, make it inevitable that the comparison contended for by Mr McGrath does not fall within the rubric of regulation 2(4), which I have set out at paragraph 7 of my Rule 3(10) Judgment in this case.

30. The facts here speak for themselves.

31. It is not simply that the Employment Judge must be legally qualified whereas no such requirement is applied to lay members. It is common ground that that distinction does not, of itself, render a proper comparison impossible. Mr Bourne provided an example of part-time

'valuer chairs' of the RPTS, who were not legally qualified but were able to compare themselves to legally qualified salaried Judges of the Tax Chamber, as Employment Judge Macmillan held in the case of **Edge and others v MOJ** (ET Case Number 3102415/2011 and others, 13 March 2014). That part of the Employment Tribunal decision in that case has not, so far as we are aware, been appealed.

32. However, even where Claimants and comparators have the same or similar qualifications and both are engaged in determining cases in a Tribunal it does not follow that they are truly comparable under regulation 2(4).

33. That fact-situation fell to be considered, again by Employment Judge Macmillan at first instance, in **Moultrie**. We have earlier referred to his self-direction as to the law in that case. Briefly, the Claimants were fee-paid medical members of Tribunals who sought to compare themselves with salaried (full-time) regional medical members. Judge Macmillan found that the roles were not truly comparable on the basis that 15 per cent of the putative comparator's actual duties were not performed by the Claimants.

34. That decision was appealed by the Claimants. The appeal was heard by Lewis J, sitting alone in the Employment Appeal Tribunal (EAT/0239/14/LA) on 4 December 2014. He reserved his judgment which was expected shortly at the time of our hearing in the present case on 14 January 2015. Having reserved our judgment we provided for the parties to make written representations on the Judgment in **Moultrie** once delivered. It was handed down on 16 January 2015. We have considered it, together with the written representations of Mr McGrath lodged on 30 January. The Respondent has indicated that it does not wish to make further submissions.

35. In short, the appeal by the Claimants in **Moultrie** was dismissed by Lewis J for reasons which we find to be clear and compelling. Absent the '15 per cent' difference the roles in **Moultrie** would be comparable both as to function and qualifications. A fortiori, where in the present case the functions and qualifications differ in the respects identified at paragraphs 17 to 20 of the Employment Tribunal Judgment, the comparison contended for by Mr McGrath must inevitably fail. It is precisely because of the different skills and experience which an Employment Judge and the lay members bring to the core function of deciding cases in the Employment Tribunal that, in the words of Lord Hope in **Matthews**, paragraph 15, each is contributing something different to work that appears to be the same or broadly similar, with the result that their situations are not truly comparable.

36. In these circumstances, had we upheld the complaint in ground six of the appeal, we should nevertheless have dismissed the appeal on the basis that any error of approach by the Employment Judge has not affected the result.

Composition of the Employment Appeal Tribunal

37. The present default position in the Employment Appeal Tribunal, since the alteration to primary legislations (see **Employment Tribunals Act 1996**, section 28) coming into effect on 25 June 2013, is that all appeals, even those cases required to be heard before a full Employment Tribunal, will be heard by a Judge alone unless a Judge directs that a full division shall be empanelled. That has resulted in a significant drop in the involvement of lay members in this jurisdiction. We make no 'quasi political' point about that state of affairs. It is the will of Parliament; we are the creatures of statute; that is the end of the matter.

38. That said, I should not wish to leave this particular case without recording my personal thanks to the two highly experienced and valued members who, as a result of the President's direction, have sat with me on this case.

39. Since I first began in practice at the bar before the old NIRC in 1972 the question has often been asked, what is the point of having lay members sitting on an Appeal Tribunal whose jurisdiction is limited to correcting errors of law by Employment Tribunals? My answer is two-fold, perception and additional independent input. As to the first, whilst Mr McGrath may disagree with our conclusion, it is the strength of the system that his appeal has been judged not simply by a lawyer, but also by his peers in every respect. That may provide a degree of validity for the litigant.

40. As to the second, it is a tribute to the independence and impartiality of my lay colleagues that they have put aside any natural sympathy for the cause espoused by Mr McGrath, with which they might possibly have been perceived to have identified by virtue of their own roles, in reaching a firm and dispassionate conclusion on the merits of this appeal.

41. Most importantly, this is the collective view of all three of us, adopting a collegiate approach, who, like Employment Tribunal panels, each bring different experiences to bear on the ultimate question, how should this appeal be determined? Equal partners contributing something different to the same end.

Disposal

42. This appeal fails and is dismissed.